Filed 10/23/12 P. v. James CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. STEVEN WALTER JAMES, Defendant and Appellant.	E053640 (Super.Ct.No. FVI1002772) OPINION

APPEAL from the Superior Court of San Bernardino County. John M. Tomberlin, Judge. Affirmed as modified.

Patricia L. Brisbois, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and A. Natasha Cortina and Kelley Johnson, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant Steven Walter James appeals from his conviction of oral copulation of a child 10 years of age or younger (Pen. Code,[1] § 288.7, subd. (b), count 1) and sexual penetration of a child 10 years of age or younger (§ 288.7, subd. (b), count 2).)

Defendant contends the evidence was insufficient to support his conviction of count 1 and the trial court erred in failing to instruct the jury on the lesser included offense of attempted sexual penetration in count 2. We find no error affecting the judgment; however, we will order an amendment of the abstract of judgment to correct a clerical error.

II. FACTS AND PROCEDURAL BACKGROUND

Defendant is the grandfather of K., who was born in March 2001, and he used to babysit her periodically. Between September and November 2010, K.'s cousin J., born in July 2001, stayed with K.'s family, and J. also visited defendant, her grandfather. After J. returned to her own home, K.'s parents noticed K. was acting different and appeared to be avoiding interaction with defendant. K. told her mother about contacts with defendant, and her mother called the police.

K.'s father and defendant's son, A., asked defendant what had happened with K. Defendant said K. was infatuated with men, was having sex with an older boy, and had been sneaking peeks at her father's and defendant's penises when they went to the bathroom. Defendant also said he had caught K. using a "dildo." Police officers had A.

---

[1] All further statutory references are to the Penal Code.

make pretext telephone calls to defendant, and the calls were recorded. The edited recordings were played for the jury, and edited transcripts were provided to the jury.

In the calls, defendant denied touching K. He said K. told him she had been having sex with a boy named Daniel. Defendant had asked K. to prove she was no longer a virgin by putting a dildo into her vagina, and she had done so. A. told defendant that K. had reported that defendant touched her inappropriately. Defendant denied doing so, but said K. had wanted him to touch her. He said K. had threatened to tell her father defendant had touched her if defendant told her parents about Daniel.

A. pressed defendant for more details. Defendant said K. was "always giving [him] moves," and he wanted to know where she had learned such things. Defendant and K. "mooned" each other, and he showed her his penis after she dared him to. He said K. had grabbed his penis when he was urinating in the bathroom. He said he "touched by her," and "did not actually touch inside. I mean, touch the—the thing. I touched her thigh. But I did not touch her on purpose." [¶] . . . [¶] And I touched just above it." He further stated, "But I touched the outer-outer rim. I didn't touch inside the—do you know what I mean? In—what—I didn't touch the clitoris, or whatever it's called. But I did touch her—thigh, and above it. I touched everything around, just so she thought I touched it, but I didn't on purpose." [¶] . . . .[¶] Oh and I—she wanted me to eat her out—um no way, but I kissed her on top of the—on top of it." [¶] . . . [¶] That was when she wanted me to do and no way, but I kissed her on top of it. Not—not in—on—you know what I mean? Her belly. Just below her belly button."

He said she had wanted him "to do what Daniel was doing," but he "faked her out. [He] put things on the side. [He] never touched the—right at it. And [he] kissed her uh just above it. Kissed her on the lips." K. had been naked when he had done so, and he "did not touch it, itself. On purpose," but he "touched around the sides of it. Around the—the leg of it." He further stated, "I touched like an inch away from it each time. On purpose, I did not wanna touch it." He claimed, "No, I never touched her inside. Never. [¶] . . . [¶] Just on the outside, but not by it. I mean, you know, by it, but not touching it. [¶] . . . [¶] . . . I touched beside it. Or on the side part of it, or above it."

He said, "But I put rules. I put rules. I will not touch—touch the outer lips, or touch inside, or enter anything inside. My—part of my body." When A. pressed, "Did you maybe go to touch her on the outside and maybe a finger went in a little?" he responded, "No. I don't think so. It could be, but I don't think so. I—nuh-uh. Because that's what I was watching for." He repeated he had touched her "[a]bout an inch away from the slit," "[o]r a half inch away from the slit. Anyway, it wasn't on the slit itself. I made sure."

K. testified that she used to visit defendant alone or with her cousin and a neighbor girl, O. When K. was seven or eight, defendant told them about a game called "dare," in which one person would dare another to do something like take off their clothes and run naked down the hallway. Other dares included touching defendant's "balls," which K. explained meant his penis. She testified that defendant had thought of that dare, and he showed the girls how to "touch it or play with it," and "just jiggle it around with our hands."

K. testified defendant touched her "front," which she described as where she "pee[s] out of," with his mouth or his hand, and he sometimes rubbed his finger around. When he used his mouth to touch her "front," he would "suck on it." Defendant also touched her "front" with a long white roundish object that massaged if it was turned on.

O., born in February 2002, testified about playing the "dare game" at defendant's house one day with defendant, K., and J. In the game, the girls dared each other to go into a shed with defendant and do something with him. Once, defendant was in the shed with his pants down, and O. touched his penis for a second and then left the shed. Another time, his pants and underwear were off, and she touched him again. A third time, she put her mouth on his penis. When police officers first questioned her, she was too afraid to tell them what had happened, but she disclosed the incidents in later interviews.

J. likewise testified she had played the "dare game" with defendant, K., and O. in which the girls took turns daring each other to go into a shed with defendant and "do something." When it was her turn, she sucked his penis and let him put his penis in her "front." Like K., she described her "front" as where she "pee[s]". She had spent two nights with defendant, and each time, they had undressed and had "s-e-x," which she also described as an "up-and-down game." Defendant would put some lotion on his penis and then put it inside her "front" "a little". Liquid came out, and defendant said, "I just came." J. testified defendant had put a "vibrating thing" in her "front" and told her it was supposed to massage her and make her feel good. She told him it hurt when he was

putting it in her "front," and defendant said, "that's weird because it hurt [K.] but then after a while, she got over it."

Police detectives interviewed defendant after his arrest. Defendant said he had K. put a dildo inside herself as part of the dare game so he could find out if she was no longer a virgin. She threatened to blackmail him by saying defendant did it to her in order to keep him from telling her father about her boyfriend. He admitted kissing K.'s "butt cheeks" and belly button, kissing "an inch above" her "pussy" and touching her thigh, but denied doing anything more. Defendant was not questioned about O. and J. because they had not yet been interviewed.

Detective Burgraff was present at the Child Assessment Center interview of O. She told the interviewer she knew what had happened to K. because a detective had told her.

The jury found defendant guilty of orally copulating and sexually penetrating a child 10 years of age or younger (§ 288.7, subd. (b); counts 1 and 2)). The trial court sentenced him to two consecutive terms of 15 years to life.

III. DISCUSSION

A. Sufficiency of the Evidence

Defendant contends the evidence was insufficient to support his conviction of count 1. Specifically, he asserts that "[t]ouching the mouth to an area above or outside of the female genitalia, but not connecting directly with the genitalia, is not sufficient to establish the act of oral copulation."

"Oral copulation is the act of copulating the mouth of one person with the sexual organ or anus of another person." (§ 288a, subd. (a).) Defendant appears to assume that the female sexual organ means the vagina. However, the external female genitalia, the vulva, includes "the mons pubis, the labia majora and minora, the clitoris, the vestibule of the vagina and its glands, and the opening of the urethra and of the vagina." (<http://www.drugs.com/dict/vulva.html> [as of October 11, 2012], quoting Stedman's Medical Dictionary.)

K. testified defendant had touched her "front" with his mouth and had sucked that area "[w]here we pee out of." From the language K. used, the jury could reasonably conclude defendant had had oral contact with her vulva. Moreover, in describing defendant's use of the dildo, she also talked about it going "inside of her front." In that context, she could only have been referring to her vaginal opening, even if she did not know that word. Again, the jury could reasonably have inferred from K.'s testimony that defendant had placed his mouth on her genitalia. (See, e.g., *People v. Wilson* (1971) 20 Cal.App.3d 507, 510 [evidence of oral copulation was sufficient when victims testified the defendant "kissed them in the vaginal area with his tongue"]; *People v. Hunter* (1958) 158 Cal.App.2d 500, 502, 505 [evidence of oral copulation was sufficient when the defendant "licked and rubbed [the victim] between her legs," and she did a similar act on him]; *People v. Harris* (1951) 108 Cal.App.2d 84, 87-88 [placing one's mouth on a female's "private parts" was oral copulation].) The evidence here is similar to that found sufficient in the cases cited above, and we therefore conclude the evidence was sufficient to support defendant's conviction of oral copulation.

B. Instruction on Lesser Included Offense

Defendant contends the trial court erred in failing to instruct the jury on the lesser included offense of attempted sexual penetration in count 2.

An offense is necessarily included within a charged offense if the greater offense cannot be committed without also committing the lesser offense. (*People v. Lopez* (1998) 19 Cal.4th 282, 288.) An attempt to commit a charged crime is a lesser included offense to the completed crime. (*In re Sylvester C.* (2006) 137 Cal.App.4th 601, 609.) The trial court has a sua sponte duty to instruct the jury on a lesser included offense when substantial evidence, in the light viewed most favorably to the defendant, warrants such an instruction. (*People v. Turk* (2008) 164 Cal.App.4th 1361, 1368, fn. 5.) However, a "court is not obliged to instruct on theories that have no such evidentiary support." (*People v. Breverman* (1998) 19 Cal.4th 142, 162.) "'"[I]f there is no proof, other than an unexplainable rejection of the prosecution's evidence, that the offense was less than that charged, such instructions shall not be given."' [Citation.]" (*People v. Friend* (2009) 47 Cal.4th 1, 51-52.)

Section 288.7, subdivision (b) provides, "Any person 18 years of age or older who engages in oral copulation or sexual penetration, as defined in Section 289, with a child who is 10 years of age or younger is guilty of a felony . . . ." Section 289, subdivision (k)(1) defines "sexual penetration" as "the act of causing the penetration, however slight, of the genital or anal opening of any person or causing another person to so penetrate the defendant's or another person's genital or anal opening for the purpose of sexual arousal, gratification, or abuse by any foreign object, substance, instrument, or device, or by any

unknown object." "[C]ontact with the hymen as well as the clitoris and the other genitalia inside the exterior of the labia majora constitutes 'sexual penetration' within the meaning of section 289." (*People v. Quintana* (2001) 89 Cal.App.4th 1362, 1371.)

Defendant claims K. gave conflicting and "equivocal testimony" about whether the dildo had gone inside her because she testified it went inside, but she did not really feel it going inside her body. She said defendant held the object and rubbed her "front," and the object "would go in or stay outside." When asked how she knew it had gone inside, she replied, "Because I remember." When asked, "Could you feel it going inside your body?" she replied, "Not really." The following dialogue ensued:

"Q Okay. Was it different than when it was just massaging your front?

"A No.

"Q Tell me about that.

"A It would be kind of—it would massage once in a while.

"Q Okay. And then it would?

"A Come right back out.

"Q Oh, so did it massage the inside of you?

"A Not really, but it would do it once in a while.

"Q Once in a while?

"A Yes.

"Q I'm confused. Explain it to me.

"A It would go in massaging like once in a while.

"Q Okay. With [defendant] holding it?

"A Yes."

Further questioning clarified that the "top" part of the device had gone inside her. In cross-examination, K. testified the "white thing" had felt different when it went inside than when it was on the outside.

In sum, although K.'s testimony may have been equivocal about how the dildo *felt* inside her, it was unwavering that the dildo had actually gone inside. We therefore conclude no substantial evidence supported instructing the jury on attempt as to count 2.

C. Correction to Abstract of Judgment

We have noted that on the abstract of judgment, the boxes indicating that defendant's terms for counts 1 and 2 shall be served consecutively were not checked, although at sentencing, the trial court pronounced that the terms would be consecutive.

"'When there is a discrepancy between the oral pronouncement of judgment and the minute order or the abstract of judgment, the oral pronouncement controls.' [Citations.] A reviewing court has the authority to correct clerical errors without a request by either party. . . ." (*People v. Contreras* (2009) 177 Cal.App.4th 1296, 1300, fn. 3.) We will order the abstract of judgment to be amended accordingly.

IV. DISPOSITION

The trial court is directed to issue a corrected abstract of judgment indicating that defendant's terms for counts 1 and 2 are to be served consecutively, and to forward the

corrected abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

HOLLENHORST
Acting P. J.

We concur:

KING
J.

MILLER
J.